BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER STATE BAR OF ARIZONA, **HENRY B. LACEY,** **Bar No. 013921** Respondent.	)	No. 05-0273 **FINDINGS OF FACT AND CONCLUSIONS OF LAW** (Assigned to Hearing Officer 7I Richard N. Goldsmith)

A. INTRODUCTION

I have found this a difficult matter. At best, Respondent took money he should not have – whether as a "loan" does not really matter. At worst, he took money and, when caught, faked a promissory note to try to cover his misconduct. All of it appears out of character. After much deliberation, I recommend that Respondent be suspended for six months.

B. PROCEDURAL HISTORY

The State Bar filed the complaint on September 30, 2005. Respondent filed his answer on November 21, 2005. The hearing was held February 15, 2006.

C. FINDINGS OF FACT

1. At all relevant times, Respondent was licensed to practice law in Arizona, having been admitted on October 26, 1991.

2. Respondent is currently an inactive member of the State Bar, having elected that status on February 17, 2005.

3. Respondent was a founder and member of the H. Karl Mangum American Inn of Court (the "Inn of Court"), a local affiliate of, and chartered by, the American Inns of Court Foundation.

4. The Inn of Court opened in Flagstaff, Arizona, in February of 2001 and Respondent was an officer. There were a few dues-paying members and a few meetings, but the Flagstaff chapter did not attract a large membership.

5. In March of 2003, the national organization changed the Flagstaff chapter's status to inactive. (*See* Reporter's Transcript of Proceedings ("RTP"), February 15, 2006, 13:16-22; 33:16-25.) Only one other chapter has ever gone inactive.

6. The Inn of Court had a checking account at The Stockman's Bank (the "Bank") in Flagstaff into which the members' dues were deposited.

7. Coconino County Superior Court Judge Dan R. Slayton was one of the members of the Flagstaff chapter. He was a co-signer on the checking account.

8. On November 29, 2004, Respondent moved from Flagstaff to Colorado.

9. On February 10, 2005, Judge Slayton received a bank statement for the account. On that date, he contacted Respondent by e-mail and asked about the balance in the account. In the e-mail message, Judge Slayton stated that the bank had previously informed him by telephone that the high balance was $660.12 on November 30, 2002.

10. Bank records showed withdrawals from the account of $200.00 in July of 2003 and of $365.99 on August 6, 2003.

11. In his e-mail, Judge Slayton asked whether Respondent knew anything about the withdrawals.

12. In a responding e-mail, Respondent said he needed to look at the bank statements to see what had happened because it had been some time since he had thought about the organization and the account.

13. In a subsequent e-mail response later that day, Respondent told Judge Slayton that he had borrowed the money and had experienced a "memory lapse earlier" in the day because his "wife has the flu, [his] daughter just got over croup, and [he] ha[d] a dying dog with cancer to take care of all day." [Stipulated fact in the Joint Pre-Hearing Statement ("JPHS") and Respondent's Answer.]

14. Respondent stated in the e-mail that he had prepared a promissory note for the funds he borrowed. [*See* State Bar's Exhibit 1 (the 10:37 p.m. e-mail).]

15. In the same e-mail response, Respondent wrote that he had "intended to write a check back to the account before we moved but didn't do it." "In the chaos of moving and the baby on the way, I let it slip my mind."

16. Respondent further wrote that he would "add up the interest (12% per year) and get it done." Respondent promised to send Judge Slayton a copy of the promissory note and to refund the money.

17. That same evening, Respondent sent Judge Slayton a third e-mail in which he calculated interest and late fees on the promissory note to total $119.14.

18. On February 12, Respondent sent a check via overnight mail for $685.13 to the Bank, along with a letter requesting that the deposit be credited to the Inn of Court checking account. He also sent a copy of the check, accompanying letter, and deposit slip to Judge Slayton via overnight mail the same day. The deposit was received by the Bank on Tuesday, February 15.

19. Along with his response to the State Bar's screening investigation, Respondent submitted a copy of a promissory note dated August 6, 2003 (the "Note"), for $565.99. [*See* State Bar's Exhibit 9.] The Note provides that it is to be paid by December 31, 2004, and

provides for a late fee of $10.00 for each 30-day period the balance is not paid after that. The Note then provides that in all events ". . . the grace period beyond December 31, 2004 shall not extend past the ninetieth day following that date." The ninetieth day following December 31, 2004, would have been March 31, 2005.

20. Respondent had the money from the bank account in his possession for about a year and a half.

21. In his Answer to the State Bar's Complaint, Respondent stated "the funds were used to pay medical bills associated with the birth of his daughter in May 2003."

22. Also in his Answer, Respondent stated that Swing Harre, the Director of Chapter Relations of the national organization, responded in the affirmative to Respondent's query whether "the remaining officers of the now-disbanded Mangum Inn of Court had discretion to use the funds as they saw fit." [Stipulated fact; *see* JPHS and Respondent's Answer at ¶ 7.]

23. In his response to the State Bar's screening investigation, Respondent claimed that the national organization informed him that the money from the previous years' dues could be disbursed as the officers "saw fit." [*See* State Bar's Exhibit 8, second paragraph.]

24. Swing Harre does not recall saying anything along the lines of "the funds did not have to be sent to the American Inns of Court Foundation or returned to the members who had paid them in to the Mangum Inn as dues." [*See* Respondent's Exhibits A and B; State Bar's Exhibit 17; *see also* RTP at 13:8-24:18 generally; RTP at 18:8-22, 19:22-20:1, 21:9-18, 22:11-18 specifically.] .

25. I find that Ms. Harre did not state or imply that Respondent could use the money as he saw fit. [*See* RTP at 13:8-24:18 generally; RTP at 19:11-20:1, 21:9-18, 22:11-18 specifically]:

Q. (State Bar Counsel) Okay. Let me see, now there was – the correspondence submitted by Mr. Lacey indicates that he asked you whether you had told him that he could do with the money as he saw fit. I may not be phrasing that exactly right but something to that effect. You reference back in an e-mail to him that you didn't recall telling him that; is that correct?

A. (Ms. Harre) Right.

Q. What do you recall your conversation with him was?

A. He had told me that he had money in the bank and he wanted some ideas what to do with it, and I said, well, we're a 501C3. You can donate it to a 501C3 organization, and we have two funds, the national office has two funds that he could donate it to as possible places.

Q. (Hearing Officer) This is the hearing officer. I'm going to ask you a question. Do you recall this conversation perhaps having your memory refreshed by the notes from the computer?

A. (Ms. Harre) Generally. I don't recall specifically. I recall having the conversation.

Q.. You had known Mr. Lacey before that conversation?

A. Correct.

Q. So you knew who he was when he was calling?

A. Absolutely. Correct.[1]

RTP at 18:8-25; 19:1-9

26. To the contrary, Ms. Harre sent Respondent information on the Markey Endowment Fund and the Sandra Day O'Connor Award as possible places to donate the money. [*See* RTP at 18:16-22; 22:2-1-18; *see also* Respondent's Exhibit B.] Ms. Harre said that the money could be donated to a 501(c)(3) organization. [*See id.*]

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[1] On cross-examination, Ms. Harre testified:

Q. (Mr. August) Okay. But you stated in your testimony that you really just had memory of talking to Mr. Lacey and you knew who he was, but you don't remember really specifically the contents of your conversations with Mr. Lacey?

A. (Ms. Harre) I do remember to a pretty strong degree because when he told me that he had money and wanted some advice, I talked to our Executive Director who is an attorney about it and, you know, just to make sure that I was giving good advice. So that the idea that money could be donated to a 501 – a like 501C3 organization.

RTP at 21:9-18

27. Respondent did not ask Ms. Harre if he could borrow the money. [*See* Respondent's Exhibits A and B; State Bar's Exhibit 17; *see also* RTP at 14:4-6; 127:10-15; 132:12-16; 133:21-134:5.]

28. Ms. Harre did not state or imply that Respondent could borrow the money. [*See* RTP at 14:4-6; 19:18-20:2]:

> Q. (State Bar Counsel) Would it be acceptable – is it allowable for an officer to borrower money from the inn account?
> A. (Ms. Harre) No. It's not right. I've never had anyone – this issue has never even come up.
> Q. How firm are you in your recollection as you expressed in your correspondence that you did not tell Mr. Lacey that he could do –
> A. I feel completely confident that I never even implied that he could borrow it.

RTP at 19:18-25; 20:1

29. Respondent never discussed the loan or a promissory note with Judge Slayton or the members of the Flagstaff chapter before he took the funds. [*See* RTP at 36:23-25; 38:17-21; 127:10-15; 132:12-16; 133:21-134:5.]

30. During the hearing, Judge Slayton testified that he started receiving the bank accounts for the Inn of Court account approximately eight to ten months before Respondent left Flagstaff. [*See* RTP at 36:23-25; 38:17-21; 51:2-24.] The Bank asked Judge Slayton if the statements could be sent to him when they had difficulty sending the statements to Respondent. [*See id.*] Judge Slayton initially did not open the statements. [*See id.*]

31. In September of 2004, Judge Slayton determined to take some action on the remaining funds in the account. [*See* RTP at 30:22-31:31:25.] Judge Slayton spoke to Ms.

Harre, who told him that the money could be donated to a 501(c)(3) organization or the Markey Fund. [*See* RTP at 23:5-16; 31:2-20.; *see also* State Bar's Exhibit 17.]

32. Judge Slayton then spoke with other former members of the Inn of Court and they decided to donate the money to the Foundation for Legal Service's program called "We the People." [*See* RTP at 31:2-20.]

33. Shortly after that, Judge Slayton learned that the account balance was lower than he had understood, and sent the e-mail to Respondent referenced above in Finding of Fact 9. [*See* State Bar's Exhibit 1; see also RTP at 30-34; 43-47.]

34. At the hearing, Judge Slayton testified (via telephone) as follows about his conversation with Respondent on February 10, 2005 [Note – the following testimony (and that in the footnote at the end) is important in determining whether Respondent was being honest in his e-mail responses and as to when the Note was prepared]:

> Q. (Hearing Officer) . . . The first e-mail that you sent was, "Hank, I just got a statement from Stockmen's Bank. The account stated that it had $34.16 in it. I was under the impression it had a lot more in it. Can you help?" That was, in fact, the first e-mail that you sent.
> A. (Judge Slayton) Okay.
> Q. So the response to that e-mail was, "It's been quite some time since I thought about it. Let me look back at the statements, if I can find them, and see what's up" and his name Hank. Do you recall getting that first response from him in response to your e-mail saying, I got a statement from them. There's only $34. Can you help?
> A. Yeah. Yes. . . . What I'm trying to get, I'm trying to recall what the exact events were. But when I got the statement I saw it and then I e-mailed Hank, and then I thought, let me go over to Stockmen's. So, I went across the street to Stockmen's and got the information.
> Q. So you got an e-mail that said it's been quite some time since I even thought about this. Let me look back at the statement if I can find them and see what's up. Hank. That seems to be a pretty straightforward response that

says, I need to look and see what happened and get back to you. Is that the way that you took it at the time?

A. It was. I knew that he just moved and I didn't know if he was going to find the statement. I think that was my motivation. He's in Colorado and I'm just across the street from Stockmen's. Why don't I get off my tail and walk across the street and find out what happened.

Q. Your Honor, let me help a bit. I'm going to try to get to your state of mind. I want to ask some questions as to what you thought, and so I really don't need the history. You've made it clear.

A. Okay.

Q. So you get that e-mail. Then you sent him an e-mail, the one that I read before, Hank, I just got off the phone with Stockmen's. They indicated that our high balance was $660. Then you mention the two withdrawals and then you say, does any of this ring a bell?

A. Right.

Q. So you've sent him the initial e-mail, he's responded to you that says I'll have to check into this, you then send a follow-up e-mail with some additional language, with additional information from the bank. Okay?

A. Okay.

Q. The next e-mail to you reads, Dan, I just got this message, and I don't know whether that's the phone message or the e-mail – let's assume it's the e-mail – I called earlier today. I had a memory lapse earlier today. My wife has the flu, my daughter just got over the croup and I have a dying dog with cancer to take care of all day, so I apologize. Here's the deal. I borrowed those funds from the account and wrote a promissory note for them with interest. In the chaos of moving and the baby on the way, I let it slip my mind. The reason for borrowing was I had an unexpected and otherwise not payable medical bill. Recall at that time my practice was basically collapsing and I had no income to speak of. At any rate I intended to write a check back to the account before we moved, but didn't do it, so I'll do it now. I'll add up the interest at 12 percent per year and get it done. Then you can do what you will with the funds. I apologize for not bringing this to your attention earlier. Please call if you wish to discuss it. I will send you a copy of the executed promissory note and of the check that I sent directly to Stockmen's Bank. I expect the bank will get the check by early to the middle of next week as I will mail it by Saturday morning at the

latest. And then he signs his name. Do you recall getting that e-mail?

A. I do.

Q. What did you think at the time?

A. I can tell you as you read it I can tell you exactly what I felt. I just felt sick.

Q. Why did you feel sick?

A. Because I felt – for a number of reasons. One, it was like I got punched in the stomach. I just felt like Hank had taken money that didn't belong to him. Some of it was my money. I mean I had contributed and to my knowledge no one had ever given him permission to use that money for his personal use. I then felt sick because I wanted to say, if you're asking for my reaction, damn it, Hank, if you needed my help, my wife at the time and I could have pulled it out of our back pocket and we wouldn't have missed it. We would have been happy to help you out. That was my gut reaction.

Q. I'm going to have two follow-up questions. The first is did it surprise you? Did it seem out of character for him to have, we'll take him at his word, borrowed this money without asking anybody?

A. Absolutely. Seemed completely out of character.

Q. When you received the e-mail that said first, it's been quite some time since I even thought about this. Let me look back at the statements if I can find them and see what's up, and then you get the second e-mail that goes into great length about the promissory note. Did you believe that he didn't know in response to your first e-mail what had happened to the money?

A. I did not feel that Hank was being completely honest with me when he wrote that second response. I just don't know how somebody would take 600 and some odd dollars from some account that didn't belong to you, forget about it, and then remember that you got this pretty extensive promissory note that was executed promising to repay it.

Q. Let me ask you an even more difficult question. The note is dated August 6 of 2003. Do you think there was a note at that time, or do you think the note was created after that?

A. I don't know. If you're asking me for a gut reaction, I think it was created afterwards, after it came up and it has to do with those two e-mails, the first e-mail saying it's been some time, I don't know. In essence, let me look at the statements. But if you've got an executed promissory

note and you know what you've done and it seems like that would have been the first response. Not, I don't know what happened to that money. Let me check the statements and try to find out. [2]
[RTP at 45:20- 50:11]

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[2] On theses issues, Respondent testified as follows:

A. (Respondent) I think I paid it back in February.
Q. (State Bar Counsel) After Judge Slayton contacted you?
A. Yes.
Q. You testified that you went looking for it in some boxes?
A. Uh-huh.
Q. So, again, you've already testified there is no guarantee, I guess, what are the odds that you would have ever come across the promissory note?
A. I would have when I unpacked the box. Whether I would have gotten to them before the end of March, I don't know. Otherwise I don't know. Look, I would have paid back their money. It was always my intent to pay back this money. I never intended not to pay it back. I wish I hadn't had to be reminded, sure. I wish that. I wish I hadn't done it at all. I realize that my word probably doesn't mean anything to anybody else, but it means something to me. I always intended to pay this note back and I did pay it back. I should not have borrowed this money to begin with. That was a mistake. If I had to do it over again, I would not do it.
Q. (Hearing Officer) How did you pick the time of the end of December, December 31st, 2004 that the note would become due when you borrowed the money on August 6 of 2003?
A. (Respondent) August 6th is to the end of the year.
Q. A year and a half?
A. End of the year.
Q. It was a year and a half.
A. Your Honor, I don't remember what was in my mind.
Q. It's kind of important that you think about it now.
A. All I can say is that seemed like a logical time.
Q. Why now?
A. It was the end of the year –
Q. It's not the end of 2003. It's the end of 2004.
A. I know at the time I didn't foresee our finances getting better any time soon. Probably what I thought by the end of 2003 I'm not going to be able to do it.
Q. Where did you get the form for that note?
A. I'm sure I drafted other promissory notes in my career and used one of the templates.
Q. How many notes have you ever seen that have a due date, then have three months of an absolute due date? I've never seen a note like that in 32 years.
A. I haven't seen that many notes, so I don't know.
Q. How did you come up with that?
A. It was a form that I probably used for another client in my practice and I used the same form.
Q. You understand what troubles me, don't you?

A. I think so.
Q. Why don't you tell me what it is?
A. You're concerned there was no note; this is all contrived after the fact. But that is not what happened.
Q. So it's just a coincidence that you received the telephone call from the judge or the e-mail from the judge during this 90 day, we'll call it, a grace period. Just a coincidence?
A. I don't know whether it is or not. I don't know what prompted Dan Slayton to call me. He e-mailed me. He did.
Q. It was a coincidence?
A. I wouldn't say that. I'm sure he had his reasons.
Q. No, no, no. For purposes of this question let's assume that you prepared the note on August 6 or shortly after that. Okay?
A. Right.
Q. The note is due a year and a half in the future.
A. Right.
Q. Which is the end of December 2004. You get an e-mail from Judge Slayton on February 10, 2005.
A. Right.
Q. And the end of the 30 days of 90 days, whatever it is, grace period, is March 2005, so it's just a coincidence, and it may very well be a coincidence – it's just a coincidence then that the judge sent you that e-mail when he did?
A. Okay, it's a coincidence. I wrote this promissory note on or about August 6, 2003. The end of 2004 struck me a that time as a logical time to make the note due. I am pretty sure that other notes that I wrote for clients, and I didn't do that many, maybe a few, but I'm pretty sure in that form I always had a grace period. That's what you did in a promissory note. I'm not an expert on it. I'm not a corporate lawyer, I'm not a transactional lawyer. A three month grace period seemed like that's what I do. That's how it got written when I wrote it.
Did I expect Dan to call me? No. I expected that I would have paid this note back before the end of December. That's what I intended to do. I didn't do that. So, yeah, I think maybe it was a coincidence.

RTP at 141:16 – 145:23

35. Respondent took $565.99 from the bank account without authorization. [*See* Respondent's Exhibits A and B; State Bar's Exhibit 17; *see also* RTP at 14:4-6; 36:23-25; 38:17-21127:10-15; 132:12-16; 133:21-134:5.]

36. Respondent stated that "the funds were used to pay medical bills associated with the birth of his daughter in May 2003," and testified that the bills were more than he had expected. [RTP at 134:9-135:21.]

37. Respondent submitted copies of his bank statements that show the dates he deposited the money that he took from the account. [RTP at 109:4-10; 135:22-136:12.] The bank statements show debits related to restaurants and coffee houses such as Starbucks (approximately ten Starbucks debits). Several debits were for entertainment, and there was also a political contribution. [RTP at 136:7-139:15.]

38. Respondent admitted that he did not have permission to take the money from the account for his own personal use, [RTP at 132:8-17.], and that he had a selfish purpose. [RTP at 138:16-139:15.]

39. At the time of the withdrawal from the account, Respondent testified that he was under considerable external stress and isolation stemming from family and financial pressures as well as isolating and traumatizing professional experiences, including an assault by a colleague in his office (RTP at 86: 1-8; 87: 1- 25; 116: 4– 25; 123:15). While this is no doubt true, it does not excuse the misconduct.

40. Due to the pressures Respondent says he and his family were under at the time he took the money, Respondent viewed the taking as an "expedient way to get through the immediate crisis" (RTP at 123: 15 – 23). Respondent now sees his actions as a "dumb thing to do," however during his testimony he also stated that, "at the time it didn't seem like a dumb

thing to do" Id.

41. Respondent presented the testimony of three character witnesses who testified as to his honest and trustworthy nature. Those witnesses were Natalie Marchese- Feltman, RN (55-59); Monique Cordova, M.A. (60-65); and Thomas W. Johnson, M.D. (67-77). Respondent has provided credible evidence of his good character and reputation.

42. Respondent has made full and free disclosure to the State Bar, and demonstrated a cooperative attitude during the proceedings.

D. CONCLUSIONS OF LAW

1. The crime of embezzlement in Arizona requires an accused to have obtained possession or control of the property of another by virtue of an existing trust relation between he or she and that person, and a fraudulent appropriation by the accused, of the property to a use or purpose not in the due and lawful execution of the trust. *See State v. Mackey*, 15 Ariz.App. 417, 419 n.1, 489 P.2d 80, 82 n.1, (Ct. App. 1971). Respondent had control of the property of the Inn of Court due to his position as an officer of the organization. Respondent took the money out of the checking account for a use or purpose that was not intended or authorized. Respondent embezzled the money.

2. The requisite element of intent in embezzlement is the intent to appropriate the property and the offense is complete when entrusted funds are diverted from the trust purpose. *See State v. McCormick*, 7 Ariz. App. 576, 584, 442 P.2d 134, 142 (Ct. App. 1968), *vacated on other grounds*, 104 Ariz. 18, 448 P.2d 74 (1968). Respondent's embezzlement of the funds was complete when he withdrew the funds from the checking account.

3. The intent to restore the funds at a later time is no defense to the crime of embezzlement. *See id.* This is because the intent to permanently deprive the owner of his or her property is not an element of the crime. *See id., see also Mackey, supra* (citing cases).

4. If Respondent's purported intent to pay the funds back is relevant at all, it is only relevant to consider in mitigation. *See Mackey, supra*, at 418-19, 489 P.2d at 81-82 (intended restoration is not to be considered in mitigation of punishment unless there has been actual restoration prior to filing of complaint).

5. The statutory definition of theft in Arizona may be found at A.R.S. 13-1802. The theft statute incorporates embezzlement. *See* A.R.S. 13-1802(A)(2).

6. Respondent intentionally took funds that were entrusted to his care, but did not belong to him, on two separate occasions. Respondent used the funds for his own personal expenses. By converting those funds to an unauthorized use, Respondent engaged in a dishonest act that meets the statutory definition of theft (which incorporates embezzlement) in Arizona, and thereby violated ER 8.4(c).

7. By misappropriating funds entrusted to his care, and diverting those funds to an unauthorized use, Respondent breached his position of private trust as an officer of the Inn of Court, and thereby violated ER 8.4(d).

8. The comment to ER 8.4 states that conduct in a position of private trust is still conduct subject to lawyer discipline: "A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, ... officer, ... of a corporation or other organization." *See* 8.4 Comment [amended effective Dec. 1, 2002]; *see also In re Rickman*, 972 P.2d 759, 761 (Kan. 1999) (quoting the Comment to 8.4 in finding a respondent violated 8.4 (c), (d) and (g) while

acting as administrator of an estate and making personal use of estate funds); *Kentucky Bar Ass'n v. Profumo*, 931 S.W.2d 149, 150-51 (Ky. 1996) (quoting the above-referenced language in holding that any abuse of a fiduciary position can and should lead to disciplinary action when an attorney is involved).

9. Respondent's conduct violates Rule 42, Ariz.R.S.Ct., specifically ER 8.4 (c) and (d).

E. ABA STANDARDS

In determining the appropriate sanction in a disciplinary matter, the analysis should be guided by the principle that the ultimate purpose of discipline is not to punish the lawyer, but to set a standard by which other lawyers may be deterred from conduct while protecting the interests of the public and the profession. *In re Kersting*, 151 Ariz. 171, 726 P. 2d 587 (1986). The *ABA Standards* are a "useful tool in determining the proper sanction." *In re Cardenas*, 164 Ariz. 149, 791 P.2d 95 (1990).

In drafting the *ABA Standards*, the Committee developed a model that requires the body imposing sanctions to answer the following questions as set forth in §3.0: (1) What ethical duty did the lawyer violate? (2) What was the lawyer's mental state? (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (4) Are there any aggravating or mitigating factors? Each question is addressed below:

1. What ethical duty did the lawyer violate?

The first prong of the analysis questions the ethical duties the lawyer violated when engaging in misconduct. The *ABA Standards* provide that a lawyer has a specific duty not only to his client, but also to the general public, the legal system and the profession. In this case, Respondent violated his duty to the public and to the profession.

Respondent violated his duty to the profession by abusing his position of private trust as an officer of the Inn of Court, an organization devoted to improving the professionalism and ethics of lawyers and judges. It is difficult to imagine behavior less in keeping with the spirit and goals of such an organization. Also, Respondent violated one of the most basic professional obligations to the public, the pledge to maintain personal honesty and integrity. "This duty to the public is breached regardless of whether a criminal charge has been brought against the lawyer." *See* Commentary to *Standard* 5.1.

2. What was the lawyer's mental state?

The second prong of the analysis questions the lawyer's mental state when engaging in misconduct. It is quite clear that Respondent intentionally took money that did not belong to him on two separate occasions. Respondent argues, however, that his intent to pay the money back removes the intent required to establish a violation of 8.4(c). Even so, this argument fails because it is clear that he intended to use the money for an unintended purpose and he has admitted that he never asked for permission. *See, e.g., State v. McCormick*, 7 Ariz.App. 576, 442 P.2d 134 (Ct.App. 1968); *vacated on other grounds*, 104 Ariz. 18, 448 P.2d 74 (1968). Respondent's conduct in asking Ms. Harre what could be done with the money but failing to ask about borrowing it also suggests a misrepresentation by omission on his part. He knew that a loan was not permitted; he knew that he was using the money for his own personal expenses and that was not an authorized purpose.[3]

3. Was actual or potential injury caused by the lawyer's misconduct?

The third prong of the analysis questions the extent of actual or potential injury caused

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[3] A good argument can be made that Respondent never intended to pay back the money. The terms of the Note were strange and suggest that the Note was prepared to fit the circumstances after the fact. I find, however, that the State Bar has not proven by clear and convincing evidence that Respondent prepared the Note only after he received the e-mail from Judge Slayton on February 10, 2005.

by the lawyer's misconduct. In this case, the record shows that the proper thing to do with the funds was to donate to a non-profit organization. Judge Slayton decided to donate the funds to the Legal Foundation. Respondent's misappropriation caused potential harm to the Foundation and ultimately to the children who would have benefited from the funding.

4. Are there any aggravating or mitigating factors?

The fourth prong of the analysis questions the presence of any aggravating or mitigating factors to be taken into consideration. The *ABA Standards* recommend sanctions for various types of conduct. The recommended sanction may increase or decrease depending on the evidence of aggravation or mitigation. "Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed." *Standard* §9.21. *Standard* § 9.22 sets forth the factors that may be considered in aggravation. Respondent had a selfish and dishonest motive. *See Standard* 9.22(b). He also engaged in deceptive practices during the disciplinary process. *See Standard* 9.22(f). He "fudged" what Ms. Harre said to him regarding the possible options with regard to the Inn's leftover funds. There are also at least two mitigating factors present: the absence of a prior disciplinary record (9.32(a)) and character or reputation (9.32(g)) (Respondent presented three character witnesses).[4]

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[4] Respondent argues that there are eight mitigating factors: absence of a prior disciplinary record, personal or emotional problems, timely good faith efforts to make restitution or to rectify consequences of misconduct, full and free disclosure to disciplinary board or cooperative attitude toward proceedings, character or reputation, interim rehabilitation, imposition of other penalties or sanctions and remorse. While I agree that Respondent had personal (and perhaps emotional) problems, it is unclear whether they were the cause of this misconduct. The "other penalties or sanctions" Respondent would have me find or relate to his inability to be licensed in Colorado, and the loss of a potential job in Alaska. What I do find is that this conduct was out of character, an isolated incident, and did not cause any real injury or harm. On balance, I find that the mitigating factors outweigh those in aggravation.

The above factors are now considered in conjunction with the *ABA Standards* that address the particular conduct. The most serious misconduct here is Respondent's misappropriation of money entrusted to his care. The *Standard* relating to a failure to maintain personal integrity appears to be the closest fit to Respondent's misconduct—although it is worth repeating that the *Standards* are simply guidelines to assist in determining the appropriate sanction, and may not always fit the misconduct precisely. *See In re Cardenas, supra.*

5.0 Violations of Duties Owed to the Public

5.1 Failure to Maintain Personal Integrity

5.11
Disbarment is generally appropriate when:
(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12
Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct, which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

(Emphasis added).

Notably, the commentary to *Standard* 5.12 observes that a lawyer should be professionally answerable only for offenses that indicate a lack of the characteristics that are relevant to the practice of law. Such characteristics specifically include dishonesty or breach of trust. *See id.*

Further, the commentary to *Standard* 5.1 states that a disbarment or suspension may be imposed even where no criminal charges have been filed against the lawyer. Although the language of Standard 5.12 seems to suggest that it relates only to criminal conduct not covered in Standard 5.11, it can also be interpreted to mean that criminal conduct committed with a knowing state of mind rather than an intentional state of mind may fit under suspension rather than disbarment. While a criminal conviction would establish an intentional state of mind beyond a reasonable doubt, because a filed criminal charge is not necessary to a disciplinary sanction, it stands to reason that criminal misconduct may be found by a Hearing Officer and the Disciplinary Commission by a clear and convincing standard, and, apparently, with a knowing state of mind rather than an intentional one.

Nevertheless, the record is clear that Respondent acted intentionally in this matter. As referenced above, criminal case law related to the crime of embezzlement shows that it makes no difference whether or not Respondent ever intended to replace the money. Respondent breached his fiduciary duty as the individual responsible for the funds of the Inn of Court. Respondent intentionally misappropriated funds to an unauthorized use, and further, the unauthorized use was for Respondent's own selfish benefit. *Standard* 5.11 is the most applicable here, and the presumptive sanction is disbarment.

Other *Standards* that provide guidance to Respondent's particular misconduct include *Standard* 5.2 (Failure to Maintain the Public Trust) and *Standard* 7.0 (Violations of Duties Owed to the Profession).[5]

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[5] If there were clear and convincing evidence that the Note was prepared after the fact, then Standard 6.1 would apply and disbarment would be presumptive.

5.2 Failure to Maintain the Public Trust

5.21
Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.

5.22
Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

7.0 Violations of Duties Owed to the Profession

7.1
Disbarment is generally appropriate when a layer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2
Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.

Here, Respondent violated his duty to the public, the system and the legal profession. He did so with the intent to obtain a benefit or advantage for himself. There was potential injury to the public and the profession. It appears that disbarment is the presumptive sanction under *Standard* 5.1, and suspension is the presumptive sanction under *Standards* 5.2 and 7.0 (because, at least arguably, the potential injury—loss of $565 donation to a charitable organization—was neither a significant benefit nor a serious injury).

F. PROPORTIONALITY

In the imposition of lawyer sanctions, the court is guided by the principle that an effective system of professional sanctions must have internal consistency. *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988). Therefore, a review of cases that involve conduct of a similar

nature is warranted. To achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Shannon*, 179 Ariz. 52, 876 P.2d 548 (1994). However, the discipline in each situation must be tailored for the individual case as neither perfection or absolute uniformity can be achieved. *In re Riley*, 142 Ariz. 604, 691 P.2d 695 (1984). The following cases are instructive in this matter.

In a case with similar facts to the case at hand, *In re Lurie*, 113 Ariz. 95, 546 P.2d 1126 (1976), the respondent was acting in the dual capacity of secretary-treasurer of the VelMar Corporation and as attorney for that corporation. He removed funds from the corporate account and his excuse was that he either borrowed the funds or that they were to offset other funds that were already due him. The disciplinary committee found that it was clear "that the respondent used corporate funds for his personal benefit without any authorization to do so." *Id.* at 97, 546 P.2d at 1128. The committee recommended a six-month suspension[6] and the respondent appealed, arguing that he was not acting in the capacity of an attorney but merely as a businessman. *See id.* The Arizona Supreme Court stated that it is no defense to charges of unethical conduct that the attorney was acting as a businessman rather than an attorney. "There is nothing to prevent an attorney from engaging in business or other activities, but when he does so he does not abandon his professional ethics if he wishes to remain a member of his profession." *Id.* at 97-98; 546 P.2d at 1128-29. The Court was similarly unimpressed with the "loan" excuse. *See id.* at 98; 546 P.2d at 1129. The six-month suspension was upheld. *See id.*

Another relevant case is *In re Apker*, SV-01-0126-D (2001). In that case, the

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[6] The stated charge was that the respondent's acts were in violation of "some or all of the following rules from the Code of Professional Responsibility [. . .] DR 1—102(A), DR 9—102(A) and (B)." Those rules were amended and replaced by Rule 42, Ariz.R.S.Ct., effective August 2, 1983. DR 1—102(A) was essentially the same as the current ER 8.4 (all subsections), Ariz.R.S.Ct. DR 9—102A and B were the trust account rules (now Rules 43 and 44, Ariz.R.S.Ct.).

respondent was hired by a property company to do foreclosure work. He received $4,646.00 from the property company for the purpose of paying a bill to a title company, but instead he converted the money for his own personal use. He also failed to respond to the State Bar and defaulted on the complaint. The hearing officer recommended an indefinite suspension but the disciplinary commission instead recommended a six month and one day suspension, noting that an indefinite suspension would not comply with the Supreme Court rules or the ABA Standards. The commission found violations of ERs 1.15(b), 8.4(b) and (d), and Rule 43(d) (trust account), and also noted that respondent committed theft under A.R.S. S. 13-1802. The Arizona Supreme Court ordered the suspension, along with costs and restitution. Due to the finding of theft, the Colorado Supreme Court disbarred the respondent under reciprocal discipline. *See People v. Apker*, No. 02PDJ088 (Colo. 2003).

Another case that is closely on point and also more contemporaneous than *Apker* or *Lurie* is *In re DiPietro*, SB-05-0028-D (2005). The respondent in that case intentionally converted $700.00 of funds to his own use, prepared a false document to hide the theft and then lied to his business partner when confronted with the theft. The respondent argued that he never intended to keep the money, but intended to pay it back when he received his next paycheck. A consent agreement was entered wherein the respondent admitted to violating ERs 4.1(a) (truthfulness to others), 8.4(b) (criminal act reflecting on fitness to practice) and (c) (conduct involving dishonesty). The Hearing Officer accepted the agreement and found that the presumptive sanction was suspension under the *ABA Standards*. The aggravating factors of dishonest/selfish motive and substantial experience in practice of law were considered. In mitigation, the Hearing Officer considered the absence of a prior disciplinary record, a cooperative attitude toward proceedings, and the imposition of other penalties or sanctions.

The Disciplinary Commission, while accepting the recommendation for a two-year suspension with two years of probation, specifically noted that a presumptive sanction of disbarment, under *Standard* 5.11, was more applicable to the facts. The Commission further noted "for future reference that termination of employment and difficulty in finding new employment is insufficient to support application of mitigating factor 9.32(k) (imposition of other penalties or sanctions)."

In the proportionality review section of the *DiPietro* case, three other cases involving conversion are discussed that may also be considered here: *In re Camacho*, SB 96-0079-D (1997) (disbarment for conversion of $3,045.75 of client funds plus intentional misleading of client and failure to consult client on settlement agreement); *In re Torosian*, SB-00-0100-D (2001) (four-year suspension for conversion of client funds due to gambling addiction); In re Riches, 179 Ariz. 212, 877 P.2d 785 (1994) (three-year suspension for conversion of substantial amounts of firm funds that took place over five year period, with mitigation of mental disability). In discussing those cases, the hearing officer noted that the *DiPietro* case was similar to *Torosian* in that there was no pattern of misconduct. The hearing officer noted that DiPietro converted a small amount of firm funds for a short period of time. The State Bar had agreed, for purposes of settlement, that the conversion, while intentional, was an isolated incident and that DiPietro intended to restore the funds within a few days had the conduct not been discovered. The decision also recognized that when the conduct was discovered, the funds were re-paid, so there was no actual harm.

From the cases discussed, and the *ABA Standards*, it appears that Respondent's conduct warrants a suspension. The difficulty lies in determining what length of suspension is appropriate. The *Lurie* case provides the lower end of the possible length of suspension for

Respondent: six months. The facts are quite similar in that case and the respondent's alleged defenses are exactly the same. The *Camacho* case provides the upper end of the possible range of sanction: disbarment. However, the respondent in Camacho engaged in several significant ethical violations in addition to theft of client funds.

It appears that the most proportional cases for this Respondent are *DiPietro* and *Lurie*. *DiPietro* is very closely on point. The only significant differences are that there were client funds at issue in that case and that DiPietro prepared a document to hide his theft and it was entirely clear that was the purpose. In this case, while Respondent may have prepared a document to hide his theft, it is not as clear on the facts as it was in *DiPietro*. The *Lurie* and *DiPietro* cases appear to set the appropriate range of suspension as falling between six months and two years. The mitigating factors here bring it down to between three and six months

G. RECOMMENDED SANCTION

As every case turns on unique circumstances and facts, it is difficult to analyze proportionality, but it is clear that the case law supports a suspension in this case. Based on the evidence presented, the *ABA Standards* and Arizona case law, my conclusion that the mitigating factors outweigh the aggravating, and that it serves no good purpose to require Respondent to apply for readmission. I recommend that Respondent receive a six month suspension, and be assessed the costs associated with this matter.

DATED this 5th day of April, 2006.

Richard N. Goldsmith
Hearing Officer

Original of the foregoing filed
this 5th day of April, 2006, with:

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